

United States  
Circuit Court of Appeals<sup>7</sup>  
For the Ninth Circuit.

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In the Matter of PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation, Bankrupt.  
UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,  
Petitioner and Appellant,  
vs.  
C. W. RYAN, as Trustee in Bankruptcy of the Es-  
tate of PUGET SOUND ENGINEERING  
COMPANY, a Corporation,  
Respondent and Appellee.

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APPEAL FROM AND  
Petition for Revision

Under Section 24b of the Bankruptcy Act of Con-  
gress, Approved July 1, 1898, to Revise, in  
Matter of Law, of an Order of the  
United States District Court for  
the Western District of  
Washington, North-  
ern Division.

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UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,

Petitioner,

vs.

C. W. RYAN, as Trustee in Bankruptcy of the Es-  
tate of PUGET SOUND ENGINEERING  
COMPANY, a Corporation,

Respondent.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. —.

UNITED STATES FIDELITY & GUARANTY  
COMPANY, a Corporation,

Petitioner,

vs.

C. W. RYAN, as Trustee in Bankruptcy of the Es-  
tate of Puget Sound Engineering Company,  
a Corporation,

Respondent.

In the Matter of PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,

Bankrupt.

**Petition of United States Fidelity & Guaranty  
Company for Review.**

To the Honorable Judges of the United States Cir-  
cuit Court of Appeals for the Ninth Circuit:

Your petitioner, the United States Fidelity &  
Guaranty Company, a corporation, hereby repre-  
sents as follows:

I.

That on or about July 21, 1919, the Puget Sound  
Engineering Company, a corporation, the above  
bankrupt, made a contract with the State of Wash-  
ington for grading, draining and paving with con-  
crete a portion of the Pacific Highway between  
Salmon Creek and Pioneer (permanent highway  
No. 2-B), in Clarke County, in the State of Wash-

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ington, in which contract, among other things, said bankrupt agreed to furnish the material and do and cause to be done said work in accordance with the drawings and specifications attached to said contract and in accordance with the schedule of unit or itemized prices attached thereto, the estimated cost of said improvement being approximately \$205,485.31; that in and by said contract the bankrupt agreed with the State of Washington to execute and furnish to said state a good and sufficient bond with an approved surety company as surety, in the penal sum of the full amount of the contract, said bond to be payable to the State of Washington.

### II.

That thereupon the bankrupt applied to petitioner for said bond and thereupon, and on July 21, 1919, the bankrupt as principal, and petitioner as surety, made and entered into their joint and several bond in writing in favor of said State of Washington, in the penal sum of \$205,485.31, the condition of said bond being that if the bankrupt should faithfully and truly observe and comply with the terms, conditions and provisions of said contract in all respects, and well and truly and faithfully do and perform all matters and things by the bankrupt undertaken to be performed under said contract, upon the terms therein proposed and within the time therein prescribed, and should fully indemnify the State of Washington against any direct or indirect damages that might be suffered or claimed for injuries to persons or property during the construction and improvement of such highway, and until the same



should be accepted, and should pay all laborers, mechanics, subcontractors and materialmen and all persons who should supply such contractors or subcontractors with the provisions and supplies for carrying on such work, and should in all respects faithfully perform said contract according to law, then said obligation, to wit, said bond, should be void, otherwise to remain in full force and effect.

### III.

That upon the execution of said contract, and execution and delivery of said bond, the bankrupt entered upon the performance of said contract and continued therein until, to wit, September 20, 1920; that on said last date said bankrupt defaulted in the performance of said contract and abandoned and refused to carry out said work, and thereupon served notification to that effect upon the State Highway Commissioner.

### IV.

That thereupon the State Highway Board of the State of Washington, acting for and in behalf of the State of Washington, terminated the employment of the contractor for the completion of said work and in writing notified said United States Fidelity & Guaranty Company to take over and complete said contract in accordance with the terms thereof.

### V.

That in and by said contract it was, amongst other things, stipulated and agreed that said bankrupt should complete all the work called for under said contract before the 1st day of July, 1920; that time was the essence of the said contract on the part of

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the contractor and that in case the contractor should fail in the due performance of the contract by and at the time mentioned or by or at such other time to which the period of completion might have been extended, said bankrupt should be liable to pay to the State of Washington, as and for liquidated damages and not as a penalty, the cost of engineering and inspection, not to exceed the sum of \$25.00 for each and every day which might elapse between the appointed and the actual time of completion.

#### VI.

That on and between the 20th day of September, 1920, and the 25th day of September, 1920, said United States Fidelity & Guaranty Company was compelled to and did advance and pay out for claims due to laborers for work performed, and to materialmen for materials and supplies furnished said bankrupt in the performance of said work, the sum of \$17,945.61, the said United States Fidelity & Guaranty Company taking assignments of said claims to D. H. McCollister as its agent.

#### VII.

That on September 25, 1920, at the same time the said United States Fidelity & Guaranty Company paid most of the claims for labor and material above mentioned, the bankrupt did make, execute, acknowledge and deliver unto the said United States Fidelity & Guaranty Company a certain bill of sale wherein and whereby said bankrupt did sell, assign, transfer and set over unto the United States Fidelity & Guaranty Company all the personal property consisting of machinery, tools, equipment,

materials, and supplies of every kind and nature whatsoever, owned and possessed by the bankrupt and located upon said work, for the purpose of enabling said United States Fidelity & Guaranty Company to perform the said contract with the State of Washington for the construction of said highway, which said bill of sale was immediately thereafter recorded and is now of record in Book "E" Record of Bills of Sale, on page 401 of the records in the Auditor's office of Clarke County, Washington, and immediately upon the execution and delivery to it of said bill of sale the said United States Fidelity & Guaranty Company entered upon and took possession of all the work under said contract and undertook to complete said contract, the value of the material and supplies so turned over to the United States Fidelity & Guaranty Company by the bankrupt under said bill of sale being the sum of \$12,000.00, and the value of the equipment so turned over to the United States Fidelity & Guaranty Company by the bankrupt being \$10,000.00.

#### VIII.

That said contract was fully completed by the United States Fidelity & Guaranty Company and was accepted by the State of Washington on February 1, 1921.

#### IX.

That on September 20, 1920, at the time when said bankrupt abandoned said contract, there was withheld by the State of Washington as reserve percentages under the contract the sum of \$29,-350.30; that within thirty days after the completion

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of said contract by the United States Fidelity & Guaranty Company, various persons claiming to have furnished labor, material and supplies to the bankrupt in the work provided for by said contract filed claims with the State of Washington in sums aggregating a total of \$24,864.17.

X.

That the total amount expended by the United States Fidelity & Guaranty Company in the completion of said contract and in the payment of claims for wages, material, provisions and supplies was \$70,997.68; that the United States Fidelity & Guaranty Company received from the State of Washington, as the balance due under said contract, the sum of \$45,579.77, and received the further sum of \$3,369.17 on account of cement sacks returned, making the total loss of the United States Fidelity & Guaranty Company in the completion of said contract the sum of \$22,048.74.

XI.

That in the completion of said contract all of the material and supplies and a large part of the equipment sold, assigned and transferred to the United States Fidelity & Guaranty Company by said bankrupt were entirely used and consumed and that a portion only of the machinery, tools and equipment remained in the possession of said United States Fidelity & Guaranty Company at the time of such completion.

XII.

That thereafter, and on, to wit, the 16th day of December, 1920, the above-named Puget Sound

Engineering Company, a corporation, was adjudicated a bankrupt by the United States District Court for the Western District of Washington, Northern Division, and thereafter, and on the 1st day of February, 1921, C. W. Ryan was duly appointed trustee in bankruptcy of the estate of said bankrupt, and thereafter duly qualified as required by law and the order of appointment and ever since has been and now is such trustee.

### XIII.

That thereafter and on, to wit, the 11th day of March, 1921, the said United States Fidelity & Guaranty Company commenced an action in the Superior Court of the State of Washington for Thurston County, wherein said United States Fidelity & Guaranty Company was plaintiff and James Allen as State Highway Commissioner, C. W. Clausen as State Auditor, Clifford L. Babcock as State Treasurer of the State of Washington, C. W. Ryan as Trustee in Bankruptcy of the bankrupt herein, and all of the persons who had filed claims with the State Highway Commissioner against the bankrupt and said bond given by the United States Fidelity & Guaranty Company were made defendants, for the purpose of having fixed and established by said Court the claims of said claimants respectively against the reserve percentages withheld by the State of Washington in the sum of \$29,538.30 and against the bond furnished by the said bankrupt and the United States Fidelity & Guaranty Company, and wherein the said United States Fidelity & Guaranty Company prayed judgment that



the said claimants so filing claims be required to appear before the said court and establish their several claims against said reserve percentages and against said bond; that the claim of said United States Fidelity & Guaranty Company for the sums advanced by it for the purpose of paying the claims of laborers, material and supply men be established as against said reserve percentages and that said United States Fidelity & Guaranty Company be adjudged and decreed to have a lien upon said reserve percentages and also a lien prior, paramount and superior to the interests of the trustee in bankruptcy of the bankrupt in, on and against all that portion of the plant, machinery, tools, equipment, material and supplies transferred and assigned to said United States Fidelity & Guaranty Company under the bill of sale above mentioned.

#### XIV.

That the said C. W. Ryan as trustee in bankruptcy filed his answer and cross-complaint in said above-entitled action wherein and whereby, amongst other things, the said trustee in bankruptcy alleged in substance: That said bankrupt was insolvent on September 25, 1920, at the time it gave to the said United States Fidelity & Guaranty Company the bill of sale conveying to it said material, supplies and equipment above mentioned; that said property was so transferred and delivered to said United States Fidelity & Guaranty Company by said bankrupt for the purpose of securing and indemnifying the United States Fidelity & Guaranty Company against the liability and obligation of its suretyship

upon the bond above mentioned; that the liability and obligation of said United States Fidelity & Guaranty Company as surety upon said bond had already been incurred, and that said transfer was in payment of or in security for the payment of an antecedent obligation, and that the said transfer was made within four months before the filing of the petition in bankruptcy against said bankrupt; that the said United States Fidelity & Guaranty Company knew, or had reasonable cause to believe, that on said September 25, 1920, the said bankrupt was insolvent, and that the making, executing and delivery of said bill of sale and the transfer of said property would, in effect, enable the said United States Fidelity & Guaranty Company to receive a greater percentage of its debt than any other creditor or creditors of the said bankrupt of the same class, and that the said bill of sale and the transfer of said property effected a preference and were void against the trustee in bankruptcy.

#### XV.

The said United States Fidelity & Guaranty Company, for answer to the cross-complaint of said C. W. Ryan, as trustee in bankruptcy, denied each and every allegation thereof.

#### XVI.

That thereafter said cause came duly and regularly on for trial before said Superior Court and such proceedings were then had that on, to wit, November 21 1921, the said Superior Court did make and cause to be entered its judgment wherein and

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whereby it did, amongst other things, adjudge and decree as follows:

That the various claimants for labor, material and supplies there should be paid out of said reserve percentages the sum of \$15,921.91, with interest thereon at the rate of 6% per annum from March 2, 1921, and the taxable costs and disbursements of each of them. [8]

That to the Union National Bank of Seattle there should be paid out of said reserve percentages the sum of \$3,000.00, together with interest thereon at the rate of 7% per annum from February 19, 1921, and its taxable costs and disbursements.

That the remainder of the fund constituting the reserve percentages should be paid to the United States Fidelity & Guaranty Company, and that the amount so received from said fund by the United State Fidelity & Guaranty Company was the sum of \$9,040.57.

### XVII.

That deducting the said sum of \$9,040.57 from the loss of \$22,048.74 sustained by the said United States Fidelity & Guaranty Company made a net loss of \$13,008.14 to the said United States Fidelity & Guaranty Company.

### XVIII.

That in and by said judgment said Superior Court further adjudged and decreed that the said bill of sale made, executed, acknowledged and delivered by said bankrupt conveying to the United States Fidelity & Guaranty Company the machinery, tools, equipment, materials and supplies, was a chattel



mortgage on said property as security for the balance due and owing to the United States Fidelity & Guaranty Company above mentioned, and ordered and directed that an order of sale issue from said Court, directed to the Sheriff of Clarke County, Washington, ordering, directing and requiring said Sheriff to sell said personal property in the manner provided by law and to apply the proceeds of said sale upon the payment of the balance due the United States Fidelity & Guaranty Company, and that all right, title and interest of C. W. Ryan, as trustee in bankruptcy of the Puget Sound Engineering Company, was subject and inferior to the rights and claims of the said United States Fidelity & Guaranty Company in said property.

#### XIX.

That thereafter said C. W. Ryan as trustee in bankruptcy as aforesaid appealed to the Supreme Court of the State of Washington from that portion of said judgment wherein it was by said Court adjudged and decreed that the said bill of sale was a chattel mortgage and that the right, title and interest of the said C. W. Ryan as trustee in bankruptcy was subject and inferior to the rights of the United States Fidelity & Guaranty Company as established by said judgment, and did not appeal from any other part of said judgment.

#### XX.

That thereafter the matter of said appeal having been duly and regularly submitted to the Supreme Court of the State of Washington, said Supreme Court did make and cause to be filed and entered its

decision and opinion wherein and whereby said Supreme Court reversed the decision of said Superior Court, and that thereafter and on, to wit, the 30th day of July, 1923, pursuant to the mandate of said Supreme Court the Superior Court of the State of Washington did make and enter its certain judgment wherein and whereby judgment was entered in said Court in favor of the said C. W. Ryan as Trustee in Bankruptcy and against the said United States Fidelity & Guaranty Company, for the sum of \$22,000.00 together with costs in said Supreme Court and said Superior Court.

#### XXI.

The United States Fidelity & Guaranty Company, petitioner herein respectfully submits to the Court that by taking over and assuming the completion of said contract upon the default of the bankrupt it preserved and saved to the estate of said bankrupt the said reserved percentages and obtained the application thereof to the payment of debts incurred by said bankrupt on said work, when otherwise, under the terms, provisions and conditions of said contract with the State of Washington, the State of Washington was entitled to and could have used and appropriated the whole of said reserved percentages for the purpose of completing said contract.

#### XXII.

And the said United States Fidelity & Guaranty Company, petitioner herein, further represents and shows to the Court that by taking over and assuming the completion of said contract upon the default of said bankrupt, said United States Fidelity &

Guaranty Company saved and protected the estate of said bankrupt from the penalties provided by said contract in behalf of the State of Washington by way of charges and penalties for noncompletion of said contract within the time stipulated in said contract.

### XXIII.

That by reason of the premises aforesaid, there is due and owing to the United States Fidelity & Guaranty Company from said bankrupt, and the estate of said bankrupt, the sum of \$13,008.17, the net loss sustained by it as hereinbefore alleged, and in addition thereto the sum of \$22,000.00, the value of the supplies and equipment taken and used by it under the bill of sale as aforesaid, as adjudged and decreed by the Superior Court of the State of Washington, making a total of \$35,008.17; that said United States Fidelity & Guaranty Company has received from the sale of a portion of said equipment mentioned in said bill of sale the sum of \$5,095.00, and has received on account of cement sacks returned by it, being a part of the material and supplies mentioned in said bill of sale, the sum of \$2,975.87, making a total of \$8,070.87, and making its total claim against said bankrupt and the estate of said bankrupt the sum of \$26,937.30.

### XXIV.

And said United States Fidelity & Guaranty Company further represents and shows to the Court that the account between it and the said bankrupt was and is a mutual, open and current

account and that, as provided by the terms and provisions of Section 68 of the Bankruptcy Act, this claimant is entitled to have set off against said liability in favor of the trustee in bankruptcy under the judgment entered by the Superior Court of Thurston County, as above alleged, the whole of its said claim of \$26,937.30.

## XXV.

And petitioner further shows that on the 22d day of August, 1923, petitioner made and filed in said bankruptcy cause in the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, its petition and claim wherein and whereby petitioner prayed that said District Court should adjudge and decree that petitioner is entitled to set off against all liability under said judgment of said Superior Court of Thurston County, Washington, the claim of petitioner in the sum of \$26,937.30, or so much thereof as should be allowed and established by the Court, and for other relief; that thereafter and on August 30, 1923, said District Court entered an order on said petition and the answering affidavit of the trustee in opposition thereto, wherein, among other things, the said District Court ordered that the petition of said United States Fidelity & Guaranty Company to set off its said claim against said judgment be denied and that said claim be considered as a general claim in said bankruptcy proceeding.

All of the foregoing facts will be made to appear

more fully unto your Honors by transcript of the record which will be transmitted to this Court.

In consideration of the error thus apparent your petitioner prays that the order of said District Court entered August 30th, 1923, be reviewed and revised in matter of law as provided in Section 24-B of the Bankruptcy Act of 1898 and amendments thereof and rules and practice in such case provided; and that by order of this Court it be decreed that the said order of the District Court of the United States for the Western District of Washington, Northern Division, be set aside and held for naught, and that this Court grant to the petitioner the relief prayed for in said petition verified August 22, 1923, and that petitioner be given such other relief as shall be proper.

CHADWICK, McMICKEN, RAMSEY &  
RUPP and

McCLURE & McCLURE,  
Attorneys for Petitioner.

United States of America,  
Western District of Washington,—ss.

C. H. Campbell, being first duly sworn, on oath deposes and says: That he is the assistant manager of the United States Fidelity & Guaranty Company, the petitioner above named, and makes this affidavit in behalf of said petitioner for the reason that petitioner is a corporation and he is such general officer; that he has read the foregoing petition, knows the contents thereof, and that said petition is true.

C. H. CAMPBELL.



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Subscribed and sworn to before me this 20th day of October, A. D. 1923.

[Seal]                      WALTER A. McCLURE,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

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In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. —.

In the Matter of PUGET SOUND ENGINEER-  
ING COMPANY, a Corporation,  
Bankrupt.

**Notice of Filing of Petition for Review.**

To C. W. Ryan, Esquire, Trustee in Bankruptcy of  
the Estate of the Puget Sound Engineering  
Company, a Corporation, Bankrupt, and to  
Messrs. McMaster, Hall & Schaefer and Sidney  
Teiser, His Attorneys:

You, and each of you, are hereby notified that on  
the 29th day of October, 1923, at the hour of ten  
o'clock in the forenoon of said day, we will file in  
the office of the clerk of the United States Circuit  
Court of Appeals for the Ninth Circuit, in the city  
of San Francisco, California, a petition for review  
in the above-entitled cause, a copy of which petition  
is hereto annexed as a part of this notice; and we

will then ask to have the case docketed and the necessary order made thereon to have such case set down for hearing.

CHADWICK, McMICKEN, RAMSEY &  
RUPP, and

McCLURE & McCLURE,  
Attorneys for Petitioner.

